Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment in	)	
the Broadcast Industry	)	
	)	
Reexamination of the Commissioner's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

OPPOSITION AND RESPONSE TO PETITIONS FOR RECONSIDERATION OF UCC *et al.*

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December 2, 1999

TABLE OF CONTENTS

Summary

UCC *et al.* submit this pleading to oppose various petitions for reconsideration which ask the Commission to grandfather all local marketing agreements ("LMA") regardless of the date of enactment. Petitioners argue that the Commission incorrectly construed section 202(g) of the Telecommunications Act by limiting LMA grandfathering relief to those agreements entered into prior to November 5, 1996. However, as the record demonstrates, the Commission's construction of the statute does not contradict the Congressional language or intent of section 202(g), rather the Commission's interpretation is wholly consistent. The Commission balanced the competing interests and equities involved and rationally decided that LMAs entered into on or after November 5, 1996 - the date when the Commission gave clear notice of their attribution - should not be grandfathered. Adoption of a balanced decision addressing several concerns is not arbitrary and capricious.

UCC *et al.* also oppose the petitions of a few parties that ask the Commission to permit broadcasters to convert LMAs into a formal duopoly even if the voice count falls below the minimum eight. Adoption of such a waiver would seriously undermine the integrity of the duopoly rule and frustrate the oft-cited goals of competition and diversity. In addition, the Commission should clarify its narrow position concerning the transfers of duopolies converted from grandfathered LMAs.

Finally, UCC *et al.* urge the Commission to reject various petitioners' requests to relax the EDP rule. First, the EDP rule is very narrow in both its construction and effect, reaching only investors with multiple ownership in broadcast licensees. Moreover, the Commission retained two significant attribution exemptions - the nonvoting stock and single majority

shareholder exemptions. In light of these exemptions and the limited application of the EDP rule, the new attribution rules leave plenty of opportunity for non-attributable investment in the broadcast arena. Thus, despite petitioners' contentions, the EDP rule will not discourage investment in new entrants in the marketplace. Finally, relaxing the EDP rule will frustrate the very purpose of the attribution rules - identifying holders of significant and controlling interests in a licensee. Contrary to Sinclair's assertions, the EDP rule is amply justified in light of the shortcomings of the previous attribution scheme. Ownership of a debt interest in a licensee provides the potential for significant control to a similar degree as an equity interest. The EDP rule correctly assures that debt and equity interests are both scrutinized by the Commission. However, UCC *et al.*, remain concerned that the EDP rule does not adequately address all potentially controlling interests in a licensee. Thus, the Commission should strengthen the EDP rule to address all indicia of control.

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OPPOSITION AND RESPONSE TO
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Pursuant to Section 1.429(f) of the Commission's Rules, the Office of Communication, Inc. of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and the Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation ("IPR") and the Media Access Project ("MAP"), submit the following Opposition and Response to Petitions for Reconsideration regarding the *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies*

Affecting Investments in the Broadcast Industry; Reexamination of the Commission's Cross-interest Policy, Report and Order, FCC 99-207 (rel. August 6, 1999) ("*Attribution Order*"). UCC *et al.* submit this pleading largely to oppose the petitions of various broadcasters who seek permanent grandfathering of all local marketing agreements (LMA)[1] and further relaxation of the equity debt plus (EDP) attribution rule.[2]

I. THE COMMISSION SHOULD NOT GRANDFATHER LMAS ENTERED INTO ON OR AFTER NOVEMBER 5, 1996

A few petitioners contend that the Commission should permanently grandfather all local marketing agreements (LMAs) regardless of the date of enactment. *See* Pegasus Petition at 4-12, Sinclair Petition at 12-17, ALTV Petition at 5-9, LSOC Petition at 25-29. These petitioners maintain that the Commission erroneously construed section 202(g) of the Telecommunications Act by limiting grandfathering relief of LMAs to those agreements entered into before November

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[1] *See* Petition for Reconsideration of Pegasus Communications Corporation, MM Dkt. No. 94-150, filed October 18, 1999 (Pegasus Petition). *See also* Petition for Reconsideration of Association of Local Television Stations, MM Dkt. No. 91-221, filed October 18, 1999 (ALTV Petition); Petition for Reconsideration of Aries Telecommunications Corporation, MM Dkt. No. 91-221, filed October 18, 1999 (Aries Petition); Petition for Reconsideration of Blade Communications Inc., MM Dkt. No. 91-221, filed October 18, 1999 (Blade Petition); Petition for Reconsideration of Lin Television Corporation, MM Dkt. No. 91-221, filed October 18, 1999 (LIN Petition); Petition for Reconsideration of Local Station Ownership Coalition, MM Dkt. No. 91-221, filed October 18, 1999 (LSOC Petition); Petition for Reconsideration of Paxson Communications Group, MM Dkt. No. 91-221, filed October 18, 1999 (Paxson Petition). These latter petitions filed under MM 91-221 address the same LMA issues raised by several parties under MM Dkt. No. 94-150. For reasons of convenience, UCC *et al.* have elected to oppose all of the petitions dealing with LMAs in this single opposition.

[2] *See* Petition for Reconsideration of National Association of Broadcasters (NAB), MM Dkt. No. 94-150, filed October 18, 1999 (NAB Petition); Petition for Reconsideration of Sinclair Broadcast Group, MM Dkt. No. 94-150, filed October 18, 1999 (Sinclair Petition); Petition for Reconsideration of Wells Fargo Communication Finance, MM Dkt. No. 94-150, filed October 18, 1999 (Wells Fargo Petition).

5, 1996. *See Id.* Moreover, they argue that the Commission did not give adequate notice of its intent to limit grandfathering of LMAs predating November 5, 1996. *Id.* But as elaborated below, because the Commission reasonably construed an ambiguous statute, and because the Commission indisputably gave all interested parties clear notice in the *Second Further Notice of Proposed Rule Making*, 11 Fcd 21655 (1996) (*Second Further Notice*) of its chosen limitation of grandfathering relief for LMAs, petitioners' contentions are simply incorrect. Finally, the Commission should not establish a waiver for LMA transfers that violate the eight voice/top four ranked station rule.

A. The Commission Reasonably Constructed Section 202(g) to Limit Grandfathering Relief of LMAs to those entered into before November 5, 1996

Petitioners argue that limiting grandfathering relief to pre-November 5, 1996 LMAs contradicts the language and intent of section 202(g). *See* Pegasus Petition at 4-7, Sinclair Petition at 15-17, ALTV Petition at 5-8, LSOC Petition at 25-29. According to petitioners, the provision unambiguously commands the Commission to grandfather all LMAs. Petitioners mischaracterize both the statute and its history and fail to properly apply the relevant standard to the Commission's construction of section 202(g). The issue is whether the Commission's interpretation is "arbitrary, capricious or manifestly contrary to the statute," not whether the petitioners can muster another plausible interpretation of the law.[3] In the instant case, the Commission's construction of section 202(g) easily surpasses this bar.

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[3] *See e.g., Federal Election Commission v. Democratic Senatorial Committee*, 454 U.S. 27, 39 (1981) (agency's statutory construction must be upheld if it is "sufficiently reasonable," even if it is not "the only reasonable one or even the reading the court would have reached on its own").

An agency interpretation of a statute is due *Chevron* deference when Congress has not "directly spoken to the question at issue." *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 842-844 (1984). If the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . Such legislation regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.*

Contrary to petitioners' assertions, Congress did not speak clearly to the issue at hand. Section 202(g) does not direct the Commission to grandfather all LMAs. Rather the provision reads "nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is *in compliance with the regulations of the Commission.*" 47 U.S.C. § 202(g) (emphasis added). With respect to how the Commission should deal with LMAs, Congress notably defers to the Commission's rules, whatever they may be.

This deference is crucial because Congress is not shy about commanding the Commission to undertake a specific course of action. When Congress decided that the Commission should eliminate provisions limiting the number of nationally owned radio broadcast stations, Congress unambiguously stated "[T]he Commission shall modify section 73.3555 of its own regulations by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally." 47 U.S.C. § 202(a).[4] In sharp contrast, there is no

[4] In fact, section 202 is full of explicit and detailed Congressional directives commanding the Commission to implement new rule changes in the arena of broadcast regulation. *See e.g.*, 47 U.S.C. § 202(c)(1) (Congress instructing the Commission to raise the national ownership limit of television broadcast stations to 35% of the national audience from 25%).

language in section 202(g) instructing the Commission how to deal with LMAs. In plain English, all the statute says is that the Commission cannot prohibit those LMAs that are allowed under the Commission's rules. Juxtaposed against the clear instructions in other provisions of the same statute, it is disingenuous to contend that the language of section 202(g) commands the Commission to grandfather all LMAs. Since the statutory directive is ambiguous, the relevant question turns on whether the Commission's "answer is based on a permissible construction of the statute." *Chevron* at 844.

And petitioners cannot credibly argue that the Commission's interpretation of section 202(g) is "arbitrary, capricious or manifestly contrary to the statute." *Id.* The Commission reasonably interpreted the plain language of section 202(g) as precluding the Commission from prohibiting any television LMAs that are in compliance with its rules. *See Local Ownership Order* at ¶ 134. Recognizing its inherent power under Titles I and III to regulate the status of LMAs, the Commission accurately ascertained that the "plain language of the statute does not require us to grandfather LMAs permanently." *Id.* at ¶ 135 - 136. Rather, the Commission interpreted section 202(g) as giving it "the discretion to adopt policies that avoid undue disruption of existing LMA arrangements while, at the same time, promote our competition and diversity goals." *Id.*

Accordingly, the Commission determined that limiting the grandfathering relief of LMAs to those entered into before November 5, 1996 is a well balanced decision that addresses the "equity, competition, and diversity issues these arrangements raise." *Local Ownership Order* at ¶ 138. The Commission reasonably chose November 5, 1996 as the cut-off because on that date it "gave clear notice that it intended to attribute television LMAs in certain circumstances, and that

LMAs entered into on or after that date that violated our local television ownership rule would not be grandfathered and would be accorded only a fixed period in which to terminate." *Id.* at ¶ 139.[5] This is a convincing rationale for distinguishing between LMAs entered into before November 5, 1996 and those formed afterward. The scales of equity weigh much more in favor of those parties who arguably had no notice of LMAs' attribution, as opposed to those who entered into these questionable combinations in the face of such clear warning.[6]

Nor can petitioners avail themselves of the legislative history of section 202(g). The oft-cited Conference Report states that "[Section 202(g)] grandfathers LMAs *currently in existence* upon enactment of this legislation and allows LMAs in the future, *consistent with the Commission's rules." See* S. Conf. rep. 104-230, 104th Cong. 2d Sess. 163, 164 (1996) (emphasis added). If anything, this language indicates a Congressional intent to limit grandfathering to those LMAs in existence at the time of the enactment of the Telecommunications Act, which was February 8, 1996. The Congressional intent gleaned from this passage coincides rather than conflicts with the Commission's decision to limit grandfathering to LMAs entered into before November 5, 1996.[7] The language simply does not

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[5] In fact several commenters argued in this proceeding, including UCC *et al.*, that the Commission should adopt an earlier cut-off date. *See Local Ownership Order* at ¶ 132.

[6] Petitioners seem to forget that the Commission has never deemed LMAs lawful. The legality of these combinations has been in question since their inception. UCC *et. al* and others have consistently questioned LMAs as outright illegal artifices of control employed to evade the broadcast ownership rules. *See* UCC *et. al* Petition at 19. In fact, even many broadcasters refrained from entering into LMAs, despite the Commission's perceived acquiescence, out of the proper belief the these arrangements were unlawful transfers of control.

[7] The Commission recognized the Conference Report's concern with LMAs that predate February 8, 1996 in the *Second Further Notice* and planned accordingly. *See Second Further*

purport to grandfather all LMAs. In addition, as the Commission points out in the *Local Ownership Order*, the Conference Report by no means directs the Commission to grandfather LMAs it finds to be in violation of the Commission's ownership rules. *See Local Ownership Order* at ¶ 136.

In sum, neither the language nor the legislative history of section 202(g) conflicts with the Commission's decision to limit grandfathering relief to LMAs predating November 5, 1996.

B. The Commission Gave Clear Notice to All Interested Parties in the Second Further Notice of Proposed Rulemaking that It Intended to Attribute LMAs Entered into On or After November 5, 1996

Petitioners also contend that the Commission failed to adequately notify parties of its intent to attribute LMAs entered into on or after November 5, 1996. *See* ALTV Petition at 11-12, LSOC Petition at 28-29, Pegasus Petition at 11-12. One petitioner in particular claims that limiting grandfathering relief to LMAs predating November 5, 1996 is an unlawful retroactive application of the Commission's rules, hinging this contention on the argument that the *Second Further Notice* was inadequate. *See* Pegasus Petition at 10. As demonstrated below, all of petitioners' arguments are without merit.

The Commission gave clear warning in the *Second Further Notice* of its intention to attribute LMAs entered into on or after November 5, 1996. The Commission explicitly stated that "by specifying this date at this time, we provide notice that television LMAs entered into after the grandfathering date will not be grandfathered if television LMAs are ultimately found to be attributable." *Second Further Notice* at 21693, ¶ 88. The language of intent is indisputable.

Notice, 11 FCC Rcd at 211692, ¶ 85 (1996).

"We are inclined to grandfather all television LMAs entered into *before* the adoption date of this *Notice* for purposes of compliance with our ownership rules." *See Second Further Notice* at 21693, ¶ 89 (emphasis in original). "[T]elevision LMAs entered into *on or after* the adoption date of this *Notice* would be entered into at the risk of the contracting parties." *See id.* (emphasis in original). "These latter television LMAs . . . would not be grandfathered and would be accorded only a brief period in which to terminate." *Id.*

The record is abundantly clear that petitioners entered into LMAs after November 5, 1996 at their own risk. Yet petitioners maintain that despite the above unambiguous language, the intent to attribute LMAs was unclear because of the extent LMA attribution depended on the other changes the Commission was considering for the duopoly rule. *See* ALTV Petition at 11; LSOC at 28, Pegasus Petition at 11. According to petitioners, no licensee could possibly ascertain the extent to which the Commission would modify the rules, and therefore, no licensee could discern how the declared attribution of LMAs entered into November 5, 1996 would play out. *See Id.* The bottom line, however, is that the Commission made absolutely clear that *any* LMA entered into after November 5, 1996 ran the risk of attribution. The extent of necessary prevision was negligible because no matter what the rest of the rules ultimately said, it was clear that engaging in the practice of LMAs was a risky proposition. The Commission explicitly stated that the purpose of the declaration was "to provide certainty to television licensees who wish to make business decisions concerning television LMAs until the attribution issue is resolved." *Second Further Notice* at 21693, ¶ 88. A smart investor or licensee would necessarily

take this warning into account (and many did), plan accordingly and simply not enter LMAs. That is the nature of conducting business in a regulated industry such as broadcasting.[8]

Petitioners raise the secondary claim that even if the message was clear, an NPRM is *per se* an inadequate means of notifying parties of agency intent. *See* ALTV Petition at 11, LSOC Petition at 28, Pegasus Petition at 11-12. This argument is equally untenable. Citing no support for the proposition, petitioners assert the novel claim that an NPRM, notwithstanding being published in the federal register, does not qualify as a notice because it does not constitute an official rule or policy.[9] Taking petitioners' argument *ad absurdum*, the only notice of agency intent that qualifies as a notice is the final order itself. Petitioners would turn the framework of administrative law, not to mention the English language, inside out to conclude that a notice is not a notice. *See generally* 5 U.S.C § 553 (basic administrative procedure turns on the use of notices to keep interested parties abreast of an agency's constantly shifting regulatory scheme).

Pegasus goes on to argue that limiting grandfathering relief to pre-November 5, 1996 is an unlawful retroactive application of the Commission's rules. *See* Pegasus Petition at 10-12.

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[8] As any reasonably prudent investor knows "[t]he property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests." *See General Telephone Co. v. United States*, 449 F.2d 846, 864 (5th Cir. 1971) (citations omitted).

[9] Notably the argument does not raise the issue of whether the Commission complied with the notice requirements of the APA. *See e.g. Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (requisite notice under the APA turns on whether the interested parties were offered a "reasonable opportunity" to participate in the rulemaking). Nor is the argument a challenge based on the logical outgrowth test, which requires that the final rule be presaged adequately in the notice of proposed rulemaking. *See e.g. American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

Pegasus hinges its retroactivity argument on having no reason to believe that LMAs may have been illegal after November 5, 1996, and in reliance on this belief, entering into LMAs after that date. *Id.* The attribution of post November 5, 1996 LMAs, Pegasus asserts, is therefore unlawfully retroactive because it impairs the petitioners' rights to enter into an LMA, rights petitioners believe they possessed in the past.

But contrary to the assertions of Pegasus and others, petitioners never had a right to enter into LMAs and petitioners were clearly put on notice that such agreements may be abrogated, negating any valid reliance argument. LMAs have always been arguably illegal transfers of control in violation of section 310(d) of the Telecommunications Act. *See* UCC *et. al* Petition at 19. Since their rise in the early 1990's, UCC *et. al* and others have consistently questioned LMAs as outright illegal artifices of control employed to evade the broadcast ownership rules. *See Id.* And notwithstanding Pegasus' claims, the Commission has not been as silent on this matter as petitioners contend.

The *Second Further Notice* is undoubtedly clear in at least one respect: the Commission will attribute LMAs entered into on or after November 5, 1996 and any party forming such an agreement on or after November 5, 1996 enters them at their own risk. *See supra* at 7-8. The *Second Further Notice* was not the first indication that the Commission considered these agreements attributable. In 1992, the Commission issued an order attributing LMAs in the radio context. *See Revision of Radio Rules and Policies, Report and Order*, 7 FCC Rcd 2755, 2784 (1992), *clarified*, 7 FCC Rcd 6387 (1992), *further clarified*, 9 FCC Rcd 7183 (1994). Moreover, in 1995, the Commission indicated that the guidelines similar to those governing radio LMAs may be necessary with regard to television LMAs. *See Review of the Commission's Regulations*

Governing Television Broadcasting, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3583 (1995). In light of such clear notice, petitioners cannot justify any reliance on the Commission's "silence" concerning the legality of LMAs to support their claim that they had a right to enter LMAs in the past that has been impaired by the new rule.

The present case is similar to *General Telephone Co. v. U.S.*, 449 F.2d 846 (5th Cir.1971), where the court upheld Commission rules prohibiting telephone companies from furnishing Community Antenna Television(CATV) service in their telephone service area. In that case, the court concluded that telephone operators could not justify reliance on the Commission's "putative acquiescence" to prohibit telephone companies from continuing to provide CATV service because the operators had been on notice for several years through numerous proceedings, including a NPRM, indicating that telephone company- CATV affiliations may be prohibited. *Id.* at 864 - 65. Similarly, petitioners cannot rely on the Commission's "putative acquiesce" that LMAs may be legal agreements, in light of the clear warning to the contrary.

In conclusion, petitioners' claims that the *Second Further Notice* was inadequate to alert interested parties of the Commission's intent to attribute post November 5, 1996 LMAs is patently incorrect. Furthermore, any retroactive application argument fails because petitioners had no established legal right to enter into LMAs, and no equitable right as well because they had clear notice of LMAs' attribution after November 5, 1996.

C. The Commission Should Not Establish a Waiver for LMA Transfers that Violate the Eight Voice/Top Four Ranked Station Standard

Several petitioners also argue that the Commission should adopt certain exceptions to the new duopoly rule with respect to the transfer of LMAs. *See* Paxson Petition at 22, Blade Petition

at 23, LIN Petition at 3, Aries Petition at 10. Paxson and Blade contend that the Commission should waive the duopoly rule where broadcasters seek to convert an LMA into an outright TV duopoly even if the voice count falls below the minimum eight. *See* Paxson Petition at 23, Blade Petition at 23. Adoption of such a waiver would be inconsistent with the Commission's stated goals of competition and diversity. Allowing duopolies where less than eight independent voices remain would render the duopoly rule meaningless. The need to preserve some modicum of competition and diversity in local areas is even greater in markets with less than eight independent voices. *See Local Ownership Order* at ¶ 70. To ignore this concern and permit existing LMAs to convert into outright duopolies frustrates the goal of preserving a minimum of competition and diversity in every local market. Moreover, permitting LMAs to waive the rule closes off the possibility of any new entrant from acquiring the LMA'ed station should the agreement need to be terminated under the new rules. *See Local Ownership Order* at ¶ 142.

LIN and Aries argue that the Commission should permit transfers of duopolies created by converting grandfathered LMAs. *See* LIN Petition at 3, Aries Petition at 10. In general, UCC, *et al.* oppose the transferability of any duopoly when the minimum voice count is not met in the relevant DMA. However, if the Commission should find that duopolies converted from grandfathered LMAs should enjoy the same benefits as grandfathered LMAs, then the Commission should clarify the limitations of such a decision. The Commission should explicitly state that only duopolies converted from grandfathered LMAs can be transferred without divestiture until 2004. Any other duopoly transfer must meet the minimum voice test at the time of transfer. Second, the Commission should clarify that any duopoly or grandfathered LMA

transferred after the 2004 review must comply with the Commission's duopoly or waiver policies at the time of transfer. *See Local Ownership Order* at ¶ 147.

II. THE COMMISSION SHOULD STRENGTHEN RATHER THAN RELAX THE EQUITY DEBT PLUS RULE

Some broadcasters ask the Commission to relax the equity debt plus rule ("EDP") rule, arguing that the rule will impede investment for new entrants in broadcast markets. *See* NAB Petition at 21, Sinclair Petition at 22. This argument is unconvincing due to both the narrowness of the EDP rule itself and recent developments in the broadcast market. In fact, as discussed below, the EDP rule leaves several significant relationships of control untouched by scrutiny of the Commission. If anything, the Commission should tighten the EDP rule, rather than relaxing it, to more adequately address all issues of control.

A. The EDP Rule Will Not Impede Investment in Broadcast Markets.

Petitioners seek reconsideration of the EDP rule because they believe the rule will attribute heretofore non-attributable ownership interests and thus discourage investment in broadcast markets. *See* NAB Petition at 23, Wells Fargo Petition at 6, Sinclair Petition at 22. This argument, however, lacks persuasive force in light of the narrow scope of the EDP rule. The EDP rule affects only investors with ownership in multiple broadcast licensees, leaving plenty of opportunity for investment, unhindered by attribution, in the general market.

The EDP rule itself is rather limited, reaching only investors owning more than a 33 percent ownership interest in a license while also possessing an attributable interest in a same market media entity or supplying more than 15 percent of programming to a broadcast licensee. *See Attribution Order* at ¶ 6. Such investors have long been subject to various Commission

regulations, due to their pre-existing broadcast holdings. Thus, petitioners' claims that EDP paperwork and filing requirements will be overly burdensome and a barrier to investment are not credible. *See e.g.*, Wells Fargo Petition at ii.

Moreover, the Commission's retention of several significant attribution exemptions further narrow the effect of the EDP rule. The Commission chose not to eliminate either the nonvoting stock or single majority shareholder exemptions; rather it merely "limit[s] their availability in certain circumstances." *Attribution Order* at ¶ 6. These exemptions still allow investors to obtain a significant level of ownership in a licensee -- up to 32 percent -- without triggering the EDP rule. Thus, petitioners cannot credibly claim that the EDP rule will curtail investment when the retention of various attribution exemptions is, in and of itself, a significant limitation on the force of the EDP rule.

B. The Commission Should Not Adopt a More Lenient Threshold for Debt Investments

Various petitioners urge the Commission to adopt a more lenient threshold than 33 percent ownership, at least for pure debt investments, because the rule will limit the flow of capital from existing broadcasters to new entrants, in particular minorities and women. *See* NAB Petition at 23, Sinclair Petition at i. Adopting a more lenient debt threshold, however, would counter the very purpose of the revised attribution rules. Moreover, as recent press reports demonstrate, the 33 percent threshold will not prevent market actors from innovating new ways of seeding money to new entrants.

Prior to their revision, the attribution rules did not recognize that investors in debt have as significant an ability to control the choices and behavior of a licensee as investors in equity. This

led to some potentially troubling broadcast deals.[10] In response to these problems, the Commission revised the previous attribution paradigm, correctly recognizing that debt is a powerful form of "contingent control" over a licensee. *See Attribution Order* at ¶ 37-38.[11] The essence of the debtor-creditor relationship is control. The need to stay current on a debt necessarily impacts the licensee's daily decisions concerning how to use its resources.

Thus, contrary to some petitioners' arguments, the Commission has provided ample justification for the EDP rule. *See e.g.,* Sinclair Petition at 22. Any attribution rule that fails to recognize the controlling nature of debt invites abuse. Accordingly, any suggestion that the Commission should backtrack on attributing debt, merely because a debt holding may not be attributable under the Commission's other attribution rules, is simply wrong. It is time for the Commission to recognize that debt, held in conjunction with either contractual rights or merely day-to-day overview of a licensee's operations, results in control, affecting both the public interest and competition in the marketplace.

Moreover, petitioners' assertion that the 33 percent threshold will "discourage investment by existing broadcasters ... in new entrants, including minorities and women" is incorrect. In

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[10] For example, in 1996, the Commission in reviewing a deal involving Qwest Broadcasting ("Qwest"), noted that a convertible debt interest constituting 37 percent of the "total capitalization" of Qwest, coupled with other ownership interests, "raise questions as to whether the level of influence conveyed by these multiple relationships should be deemed nonattributable."*See* In re Applications of Quincy D. Jones (Transferor) & Qwest Broadcasting L.L.C., (Transferee),11 F.C.C.R. 2481 (1995).

[11]*See also* Richard M. Cieri *et al., Breaking Up is Hard to Do: Avoiding the Solvency-related Pitfalls in Spinoff Transactions*, 54 BUS. LAW. 533, 604 (1999) (Because debt securities are convertible to corporate stock, such security holders may be viewed as "contingent" stockholders.); William L. Bratton, *Dividends, Noncontractibility, and Corporate Law*, 19 CARDOZO L. REV. 409 (1997).

fact, broadcasters have recently united to announce the creation of an investment fund devoted solely to injecting capital in new entrants, particularly minorities and women. *See* Paige Albiniak, "Industry seeds Prism Fund: CBS, Clear Channel, others commit $175 million to minority investment pool," Broadcasting and Cable, at 10 (Nov. 8, 1999). The Prism Fund will provide up to $1 billion to media businesses owned by minorities and women. *See id.* The fund demonstrates that the new attribution rules will not impede broadcasters from investing large amounts of capital in new entrants.

C. The Commission Should Tighten the EDP Rule to More Adequately Address All Issues of Control

The Commission has stated that the purpose of the EDP rule is to counter incentives of "firms with existing local media interests ... to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations." *Attribution Order* at ¶ 51. But the EDP rule does not adequately address all issues of control in situations involving multiple ownership. *See* UCC, *et al.* Petition at 5-11. On reconsideration, at least one other party highlights significant loopholes in the EDP rule that the Commission should address.

As NAB correctly points out, the EDP rule fails to address issues of control in highly leveraged companies, leading to inconsistent results depending on the capitalization structure of the company in question. *See* NAB Petition at 24-25. This problem, however, contrary to NAB's petition for reconsideration, is not an argument for relaxing the EDP rule. Rather, the EDP rule should be tightened so that it equally affects owners of either debt or equity in a licensee.

In conclusion, several petitioners incorrectly raise issues of concern that the new EDP rule will discourage investment in the broadcast sector and should be relaxed. These concerns, however, are unwarranted. Contrary to petitioners assertions, the Commission should strengthen, rather than weaken the EDP rule to ensure that all significant or controlling interests in a licensee are attributed.

CONCLUSION

The Commission was correct to limit LMA grandfathering relief to those agreements entered into on or before November 5, 1996. The Commission's construction of section 202(g) is reasonable and the result of a balanced administrative decision-making process. Furthermore, the Commission should deny petitioners' requests to be able to convert LMAs into a formal duopoly even if the voice count falls below the minimum eight. Adoption of such a waiver would seriously undermine the integrity of the duopoly rule and frustrate the oft-cited goals of competition and diversity in all local markets. Finally, the Commission's new EDP rule will not discourage investment in new entrants in the market. In fact, the Commission should consider strengthening the rule.

Respectfully submitted,

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December 2, 1999

Certificate of Service

I, Martha L. Rodriguez, hereby certify that a copy of the foregoing "Opposition and Response to Petitions for Reconsideration of UCC *et al.*," was sent this Thursday, December 2, 1999 via first class mail, postage prepaid to:

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